

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SUFFOLK COUNTY WATER
AUTHORITY,

Plaintiff,

v.

THE DOW CHEMICAL COMPANY,
et al.,

Defendants.

Case No. 17-CV-06980 (NG)

Brooklyn, New York
December 10, 2019

* * * * *

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

MATTHEW EDLING, ESQ.
KATHERINE JONES, ESQ.
STEPHANIE BIEL, ESQ.
Sher Edling LLP
100 Montgomery Street
Suite 1410
San Francisco, CA 94104

SCOTT ALLAN MARTIN, ESQ.
JEANETTE BAYOUMI, ESQ.
Hausfeld LLP
165 Broadway
Suite 2301
New York, NY 10006

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

Fiore Reporting and Transcription Service, Inc.
4 Research Drive, Suite 402
Shelton, Connecticut 06484 (203)929-9992

APPEARANCES (Cont'd):

For New York American Water Co., Inc, Defendant:	FRANK SCHIRRIPA, ESQ. HILLARY NAPPI, ESQ. Hach Rose Schirripa & Cheverie, LLP 112 Madison Avenue New York, NY 10016
For Dow Chemical Company, Defendant:	KEVIN T. VanWART, ESQ. NADER R. BOULOS, ESQ. Kirkland & Ellis LLP 300 N. Lasalle Chicago, IL 60654 JOEL ALAN BLANCHET, ESQ. Phillips Lytle LLP One Canalside 125 Main Street Buffalo, NY 14203
For Ferro Corporation, Defendant:	ROBB W. PATRYK, ESQ. FARANAK TABATABAI, ESQ. Hughes Hubbard & Reed LLP One Battery Park Plaza New York, NY 10004
For Shell Oil Company, Defendant:	DANIEL MARK KRAININ, ESQ. Beveridge & Diamond, P.C. 477 Madison Avenue New York, NY 10022
For Proctor & Gamble Company, Defendant:	DAVID J. LENDER, ESQ. JED P. WINER, ESQ. Weil, Gotshal & Manges, LLP 767 Fifth Avenue New York, NY 10153
For Vulcan Materials Company, Defendant:	FELICE B. GALANT, ESQ. STEPHEN C. DILLARD, ESQ. Norton Rose Fullbright US LLP 1301 McKinney Suite 5100 Houston, TX 77010

1 (Proceedings commenced at 2:48 p.m.)

2 THE COURT: We're having technical problems, so
3 we'll proceed without the recording.

4 There are some cases where I wouldn't dare do that
5 because the counsel wouldn't even agree on what was said at
6 the conference, but I know that you have been working
7 cooperatively.

8 So, again, have you come up with a proposal for
9 going forward?

10 And I understand we are on the record. Just so the
11 record is complete, at the outset, I had everyone state their
12 appearances and those will be noted in the minute entry.

13 Mr. VanWart.

14 MR. VANWART: Yes. Your Honor, we've had productive
15 discussions. We believe the next phase should proceed. And
16 in a nutshell, as you know, we've received the fact sheets
17 together with documents. We're still working through those.
18 And we might identify some issues, but we think we're going to
19 be able to resolve them.

20 But our proposal is that we try to resolve any
21 issues by January 21 and then report to the Court by January
22 21 if there are issues relating to the fact sheets.

23 At the same time, we want to go to the next -- the
24 next phase of discovery which is document collection. And the
25 document collection would consist of party document requests.

1 So everybody would get a document request, respond to the
2 document request. And at the same time, we would be serving
3 subpoenas on third parties who have relevant documents.

4 And we've identified some entities that are going to
5 be the initial wave of those requests. We actually reviewed
6 them with representatives of the plaintiffs and they indicated
7 that they actually might join in some of those. So we're all
8 kind of on the same page, but we'll be working toward those.

9 The other part of the discovery that we're proposing
10 would be a single interrogatory simply asking each plaintiff
11 that for each well that is at issue identify each known or
12 suspected cause of the dioxane, the source of the dioxane.
13 And so we're still having a discussion with plaintiffs about
14 the interrogatory, but that would be the basic roadmap.

15 And then we would provide the Court a status report
16 by January 21 indicating whether we've resolved issues
17 relating to the fact sheets and then what our progress has
18 been in meeting the deadline for serving -- or the target date
19 for serving subpoenas and document requests.

20 THE COURT: And what is the target get? Have you --

21 MR. VANWART: January 21. So we would be --

22 THE COURT: So the discovery demands and the
23 subpoenas would issue around January --

24 MR. VANWART: By. Yes. By. Which ususally is that
25 date, but (indiscernible.)

1 THE COURT: All right. Anyone else want to be
2 heard? And by the way, you're welcome to remain seated so
3 you're closer to the microphone. Some of you project your
4 voices better than others. But now that we have the recording
5 working, I'd like it to capture what you're saying.

6 MR. EDLING: Okay. Then I'll sit back down.

7 Perhaps not surprisingly because we have had
8 constructive conversations, everything that Mr. VanWart said
9 we agree with. We discussed this morning what I'll categorize
10 as sort of truncated or focused interrogatories.

11 I think that we'll still go back. I understand what
12 the defendants want. We will confer with New York American
13 Water to determine a narrow set of interrogatories to the
14 extent we think that they're appropriate at this stage.

15 I do think all parties agree that sort of the
16 threshold, most important part of the case, at this stage is
17 the accumulation of relevant documents.

18 In a case like this it frequently, if not uniformly,
19 is important to make sure that the documents reflecting the
20 hydrogeology and potential sources are known to all parties as
21 it goes to various affirmative defenses and claims of the
22 plaintiffs.

23 So I like the aggressive target that Mr. VanWart
24 shared with Your Honor. And I think based on our collective
25 experience, we would hope that by the end of the first quarter

1 we'd be able to tell Your Honor here's everything we got with
2 respect to that.

3 And obviously with some of the third parties -- or
4 I'll -- let me start that part of the sentence over -- we
5 can't control third parties as well as we can parties, but my
6 hope is is if we're working cooperatively, as we are, we'll
7 have a better success rate in terms of the accumulation of
8 those documents and can report back to Your Honor, which
9 perhaps is a transition as to, you know, I think or hope by
10 the end of the first quarter we'd be able to give Your Honor
11 sort of a next-stage suggestion.

12 And I do appreciate it's perhaps unusual for the
13 plaintiffs to say we don't, you know, we don't demand a trial
14 date at this stage and a full, robust pretrial schedule.

15 We've talked about that sort of at length and I do think
16 this is probably the best approach at this stage. And then
17 we'd be in a position to sort of highlight for Your Honor what
18 the next step or steps are, especially given the number of
19 parties and the potential for, you know -- I don't know if
20 there'll be other parties, but not by my office.

21 THE COURT: And if you're talking about doing this
22 as a phased approach and reporting to the Court, I take it
23 January 21st -- if that's the deadline for serving demands and
24 subpoenas -- you're not -- that's not the point at which you'd
25 be able to tell me whether you've accumulated most of the

1 documents that you want. So you're talking about a second
2 date that would be at the next stage where you're ready to
3 start the next phase?

4 MR. EDLING: Yeah. I was thinking -- and we
5 discussed a little bit -- that we should know -- and, you
6 know, to the extent there are any issues with respect to, you
7 know, motions to compel or whatever after the 21st, we'd be in
8 a position by the end of the first quarter, so the end of
9 March, to have -- if not resolved -- be able to identify for
10 Your Honor what that next stage would be. And to the extent
11 there are any differences, flesh those out for you.

12 THE COURT: I did hear you say the first quarter,
13 but I wasn't sure whether you meant the first quarter of the
14 year or whether you were measuring from some other start date.

15 MR. EDLING: Yeah. No. I'm simply thinking that if
16 subpoenas go out on the 21st, there will be extensions given,
17 perhaps discussions about the breadth or not, and that by the
18 end of March we'd be in a position to have gathered those
19 documents or identified issues for you.

20 THE COURT: Now if the parties had conducted and
21 exchanged initial disclosures rather than the fact sheets, one
22 of the requirements for initial disclosures is for plaintiffs
23 to provide estimates of their damages. Just looking quickly
24 over the fact sheet, I didn't see anything dealing
25 specifically with damages.

1 Do the plaintiffs have any sense of what the
2 remediation costs have been and will be going forward? And
3 this is -- I'm not going to hold you to it, but I just --

4 MR. EDLING: Sure.

5 THE COURT: -- for a ballpark --

6 MR. EDLING: Yeah. No. Sure. We do. Some of it
7 is frankly in the public domain. There's a lot of reporting
8 on this.

9 But the upshot is there is treatment technology that
10 has known capital costs -- and I'm not trying to be opaque, it
11 is different depending upon the well -- but has known capital
12 costs associated with it for the advanced oxidation process
13 treatment, generally referred to as AOP, and then granulated,
14 activated carbon. Those two in conjunction is the treatment
15 technology that's being employed.

16 Some of the plaintiffs in this case have begun and
17 even concluded pilot testing with that. Others have budgeted
18 for it. So you have traditionally in cases like this, kind of
19 the focus of the damages is generally on a per impacted well
20 basis. So you have your capital costs, which I just sort of
21 identified for you. You'll have your operating and
22 maintenance costs that will sort of extend out for the life of
23 that infrastructure.

24 And then commonly, and then absolutely, at the time
25 of trial, that would be discounted to present value. And on

1 top of that, you'd have periodic costs.

2 I'm telling you what is going to go into it. Not
3 because I don't want to tell you this is the number, but it is
4 different depending upon each well size.

5 For some of the plaintiffs in this case there are
6 documents that have already been produced that reflect those
7 reasonably anticipate costs. There are also, frankly, more
8 than perhaps we would all like or can control estimates in the
9 press as to how much all of this is going to cost.

10 And I am sure that in the discovery that is coming
11 the type of estimates that are not just subject to expert
12 discovery are going to be shared, because all of these water
13 providers have to budget. And the engineering that goes into
14 those budgets is obviously discoverable. And so that, to the
15 extent it hasn't already been produced, will be. That's a
16 mouthful.

17 THE COURT: Well, now you've explained the
18 framework, but you haven't put any numbers on it. Not even
19 per well, range or give an example of what a particular
20 plaintiff has budgeted for.

21 MR. EDLING: Fair enough.

22 THE COURT: I haven't followed the stories in the
23 press so I haven't seen those numbers.

24 MR. EDLING: (Indiscernible) cost an O&M on a
25 traditional well for something like this is going to be

1 somewhere between 8 and 12 or 13 million dollars per well
2 depending upon the well size. That is an estimate. I am 100
3 percent sure that my colleagues to this side are going to vet
4 those numbers.

5 But in terms of, you know, a number or a category
6 that could sort of be part of that calculus, that's not an
7 unreasonable estimate. There are documents that reflect this
8 on a per well basis that will be continued to be exchanged.

9 THE COURT: And given the dozens of plaintiffs in
10 this case, what are we talking about in terms of the number of
11 wells?

12 MR. EDLING: Fair. For our clients, we are in the
13 neighborhood of between -- there are approximately 300 wells
14 at issue.

15 Now there are some wells that have exceedances above
16 what we all believe will be the maximum contaminant level.
17 And there are some that are below that but that require
18 ongoing monitoring. And it is we believe the law the injury
19 is not defined by the MCL.

20 But from the perspective of the water providers,
21 they cannot provide water above the MCL. So the costs that
22 they are doing and budgeting for anticipate that MCL and what
23 they would have to treat and the cost of treatment on a per
24 well basis. That does not disaggregate those wells that are
25 above the MCL and those that are below.

1 So we're talking hundreds of wells at issue.
2 There's various press reports that put them in the hundreds
3 and perhaps as much as a billion dollars would be an estimated
4 treatment cost in Long Island.

5 And there already are now, you know, public debt
6 that's being obtained and costs that are being extended to the
7 rate payers to pay for that.

8 THE COURT: The reason why I asked that question is
9 because I would certainly encourage the parties to try to see
10 whether some or all of the claims can be resolved through
11 settlement. Has there been any discussion about mediation?

12 MR. VANWART: The answer is no, Your Honor. But
13 several of the questions that you just posed to Mr. Edling
14 were questions that I posed this morning.

15 MR. EDLING: Yeah.

16 MR. VANWART: And so --

17 THE COURT: And you didn't get as much information
18 as I did?

19 MR. VANWART: There was more skepticism in my
20 questions and the review of the answers.

21 But just a couple of things. There are still a lot
22 of moving parts out there in the public including relating to
23 the MCL. And what I said to Mr. Edling is you're throwing out
24 this number, 300 wells, that's inconsistent with what's in the
25 media.

1 A lot of the plaintiffs are telling their customers
2 that they're not all going to go to this treatment system if
3 they have to do it. They're going to blend it. They're going
4 to try to find a different water source. They might increase
5 pumpage rates at other wells. There are all sorts of things
6 that can happen that will affect whatever the ultimate damages
7 might be claimed in the case.

8 And then at the same time, the AOP figure that he
9 just quoted, the State has been quoting substantially lower
10 figures. We don't know what the real numbers are.

11 But what I said to Mr. Edling is, I said, look, it's
12 going to be in everybody's interest that you just keep us
13 informed on a regular basis what the real number of wells are
14 potentially at issue. That is something that's useful for
15 everybody to know and have that as they're looking at issues.

16 There's a lot of information that's needed I think
17 before you could have a meaningful discussion about
18 resolution. And for us, the most important is how did the
19 dioxane get into these wells? And that was not developed to
20 the extent that we had hoped it would be in the answers to the
21 fact sheets.

22 But there is a story for each well that will provide
23 important information about what is the actual source within
24 the capture zone of the well that led to that contamination.
25 And there would be other parties who would then have an

1 interest in the resolution. And his own conduct might be at
2 issue in this proceeding.

3 We're just starting that phase now. As we said,
4 collecting this baseline information is going to be important
5 over the next several months.

6 But we're nowhere near the point where we could talk
7 about a resolution, because all we know is we've made certain
8 things, but there's no information about how it actually ended
9 up in these wells and that's a story that's still to be
10 developed.

11 THE COURT: Well, are you suggesting that the
12 defendants may want to bring in third-party defendants?

13 MR. VANWART: I think that there will be an issue
14 about -- an evidentiary issue as to what the contribution is,
15 what the role was. It's not clear yet what we actually need
16 to bring into a case. That's something that we would be
17 considering. But right now, we're just trying to pin down the
18 basic facts as to what is the actual pollution source, what
19 happened.

20 THE COURT: So what would you like to accomplish
21 today at this proceeding? I'm prepared to issue an order
22 directing that you report to the Court by January 21st. Do
23 you want me to include in that order that document demands --
24 well, I guess it would be interrogatories, document demands,
25 and subpoenas all be issued and served by January 21st?

1 MR. VANWART: You know, I mean, (indiscernible)
2 first wave, Your Honor, because as you get information, you
3 have more leads and there'll be some followup. But I think
4 that's an appropriate -- it's a target date, but we will do
5 our best to meet it. And then we'll be working with them on
6 some of the subpoenas that (indiscernible).

7 MR. DILLARD: Your Honor, Mr. Dillard, on behalf of
8 Vulcan.

9 Perhaps I misunderstood something. I thought the
10 interrogatories, as I understand it, would consist of one
11 interrogatory asking about the source of dioxane to the extent
12 plaintiff has that information.

13 THE COURT: Well, I said interrogatories because I
14 thought the defendants might be serving interrogatories.

15 Unless you're satisfied with the fact sheets.

16 MR. VANWART: And the reason -- just a little bit of
17 history -- and this is an issue that's been resolved -- there
18 was a privilege issue raised and we were satisfied with the
19 explanation that we got. But we're trying to use the
20 interrogatory in part to replace what we expected to get from
21 the fact sheet.

22 It is simply you're the plaintiff, these are your
23 wells. Tell us what you know either about the actual source
24 of the contamination, the dioxane, or your suspected source.
25 It's really straightforward and we don't think it's going to

1 take a lot of work on anybody's part.

2 THE COURT: But when I used the term
3 interrogatories, I did not mean to suggest that they wouldn't
4 be focused, which is what the parties are talking about. And
5 it may well be that it will be one interrogatory served by all
6 plaintiffs on each defendant. But you've got more than one
7 defendant, so you've got plural interrogatories at that point.

8 MR. VANWART: I would suggest that Mr. -- that we
9 have more discussions with the plaintiffs about the
10 interrogatories. We don't want to open up kind of a can of
11 worms. We want to get the documents. And we think that the
12 interrogatories can be problematic. Is it going to be worth
13 the effort? So I suggest we have more discussions.

14 MR. EDLING: Yeah. I mean, Mr. VanWart and I and
15 Mr. Blanchet met this morning and discussed sort of the type
16 of discovery, including interrogatories, and I learned this
17 was what they wanted to do.

18 And I told them -- and it is our practice -- that we
19 have perhaps targeted interrogatories that we may serve by
20 January 21. We may elect to defer those. I don't really have
21 an interest -- and I'm certain that they don't have an
22 interest -- in sort of, you know, interrogatories for
23 interrogatories sake.

24 I do personally think that the best approach in
25 these types of cases is the document production, the document

1 gathering, third-party discovery. We and they have an
2 interest in the chain of distribution and frequently, as Mr.
3 VanWart was alluding to, leads to sort of the key claims and
4 defenses. And perhaps for them the inclusion or not of third
5 parties.

6 But it is certainly an evidentiary issue that comes
7 up in all of these cases where the theory of liability is at
8 the manufacturing level as opposed to sort of, you know, think
9 of your quintessential (indiscernible) allocation
10 responsibility.

11 THE COURT: So what you had in mind was a joint
12 status report by January 21st?

13 MR. VANWART: Yes, Your Honor.

14 MR. EDLING: Yes.

15 THE COURT: And then do you anticipate you'll be
16 requesting another conference or just including in the status
17 report a proposal for discovery in the next phase?

18 MR. EDLING: I certainly hope it's the latter. I
19 think we would request a status conference only if there are
20 issues that remain unresolved between the parties, which I
21 don't expect.

22 And to the extent Your Honor wishes, I mean, we
23 could set a status conference towards the end of the first
24 quarter if you wish. Or we could, you know, propose something
25 to Your Honor in that update if you'd like.

1 THE COURT: Well, if you think it's likely that the
2 parties will want another status conference, then I would
3 suggest it makes sense to pick a date now since there are so
4 many of you rather than trying to come up with a date several
5 months from now when people's calendars are full.

6 MR. VANWART: I think, Your Honor, in terms of
7 dates, realistically, if we serve subpoenas say mid January,
8 sometime in January, you have the dialog and hear objections
9 and try to narrow and have discussions to focus, that's going
10 to take some time.

11 And then we finally get documents that we then use
12 and work with our expert and so forth. So to me,
13 realistically, we're probably talking what March or April?

14 THE COURT: Well, do we want it before or after the
15 holidays in early April? We've got --

16 UNIDENTIFIED: After.

17 UNIDENTIFIED: After.

18 MR. VANWART: Not to mislead Your Honor, you could
19 be seeing motions but from third parties once they get our
20 subpoenas and try to work them out. But you might be hearing
21 from us anyway.

22 MR. EDLING: Not our subpoenas. Just theirs.

23 MR. VANWART: Yeah.

24 MR. EDLING: They'll love ours.

25 THE COURT: All right. So I'm looking at the week

1 of April 13th. I don't have availability on that Monday or
2 Thursday morning. But other than that, right now, it's fairly
3 open. So do counsel have a preference?

4 UNIDENTIFIED: No.

5 THE COURT: For those of you coming from out of
6 town, do you prefer to be here on a Friday?

7 UNIDENTIFIED: Friday morning's preferable.

8 THE COURT: Friday morning? 10 o'clock. The 17th?

9 UNIDENTIFIED: That's fine.

10 (Pause.)

11 MR. DILLARD: Your Honor, I'm sorry. Again, what do
12 you have mid week?

13 THE COURT: I said I have -- if you want it on
14 Wednesday, we could do it 10 o'clock Wednesday morning.

15 MR. DILLARD: Anybody have a problem with that?

16 MR. EDLING: No. That works. Thank you, Your
17 Honor.

18 THE COURT: All right. That's April 15th for anyone
19 who expects to be working madly to get your tax returns done.
20 I throw that out there.

21 MR. EDLING: It will be a welcome respite, Your
22 Honor.

23 THE COURT: And I would hope that by that time the
24 parties will have sufficient information so that you can at
25 least look ahead towards perhaps mediating these cases to see

1 whether or not they can be resolved or at least narrowed.

2 Is there anything else that any of you would like to
3 discuss?

4 MR. DILLARD: Your Honor, just the observation that
5 there are these additional cases where the defendants have not
6 yet appeared. I think our appearance date is like the 20th of
7 December. And so --

8 THE COURT: But we're talking about the same
9 defendants so --

10 MR. DILLARD: That's correct.

11 THE COURT: -- their representatives are here now.

12 MR. DILLARD: Well, that's correct. My point was
13 going to be talking about mediation after a certain date. I
14 mean, I think there's going to be a delay in getting the fact
15 sheet responses because there's still these four or five cases
16 out there where the basic information has not been gathered
17 yet.

18 THE COURT: All right. Well, I hope, as I said
19 earlier, that the parties can play catch-up in those cases. I
20 assume that once you've -- it becomes easier the more OF these
21 fact sheets that you prepare -- which isn't to say that you're
22 -- that the plaintiffs don't have to dig up information about
23 -- well, you've got the information about each well. There
24 are new plaintiffs? Yeah. The new plaintiffs.

25 MR. EDLING: Correct.

1 THE COURT: So have they started gathering that
2 information even though the defendants haven't answered?

3 MR. EDLING: Yes. I'll say that for the newly filed
4 cases, other than but one are represented by my firm. That
5 other case, I don't know.

6 THE COURT: Mr. Schirripa, are you representing that
7 other plaintiff?

8 MR. SCHIRRIPA: Yes, we represent (indiscernible).

9 MR. EDLING: No. No. No. The other plaintiff is
10 --

11 THE COURT: No, the new --

12 MR. EDLING: -- is Hicksville. It's represented by
13 another plaintiffs' firm. I can reach out to him and tell him
14 to get to work.

15 THE COURT: And they didn't -- I'm disappointed that
16 they're not here.

17 MR. EDLING: I don't know that they were -- actually
18 I'm fairly sure they filed after the order with respect to
19 this status conference as well as the fact sheet. I think
20 they recently filed.

21 THE COURT: I'm not suggesting that they're in
22 violation of any court order, but I just would have thought
23 that they would be aware of this status conference and that
24 they would have an interest in showing up.

25 MR. EDLING: I will make sure to let Mr. Napoli

1 know.

2 THE COURT: All right. All right. Anything else?

3 MR. EDLING: Not from me, Your Honor. Thank you.

4 THE COURT: All right. Thank you all very much.

5 And keep up the collaborative work. It's actually a pleasure
6 because most of the big cases that I have I can't remember the
7 last time I got out of a conference in half an hour. More
8 like three hours. All right. Take care.

9 (Proceedings concluded at 3:14 p.m.)

10 I, CHRISTINE FIORE, Certified Electronic Court
11 Reporter and Transcriber, certify that the foregoing is a
12 correct transcript from the official electronic sound
13 recording of the proceedings in the above-entitled matter.

14
15 

16 December 11, 2019

17 _____
18 Christine Fiore, CERT
19
20
21
22
23
24